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Commission Administrator

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Secretary and Chief Counsel

November 26, 2008

The Honorable Kevin Martin, Chairman
The Honorable Deborah Taylor Tate, Commissioner
The Honorable Michael Copps, Commissioner
The Honorable Jonathan Adelstein, Commissioner
The Honorable Robert McDowell, Commissioner

Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**RE: COMMENTS IN THE MATTER OF INTERCARRIER COMPENSATION
REFORM, CC Docket Nos. 96-45, 96-98, 99-68, 99-200, 01-92 and WC
Docket Nos. 03-109, 04-36, 05-337, and 06-122.**

Dear Chairman and Commissioners:

We urge the Commission not to approve the proposal to reform intercarrier compensation and universal service released on November 5, 2008. A number of negative and disruptive effects are to be expected if the proposal is allowed to go forward. For example, we expect the proposal would fail to create a regime that would provide reasonable comparability of rural and urban rates, or a sufficient universal service fund -- especially for carriers providing service in rural Wyoming whose cost of service is already high. Unifying intercarrier compensation charges among the state and interstate jurisdictions will disrupt the Wyoming Public Service Commission's (WyPSC) statutory jurisdiction over intrastate access charges (W.S. § 37-15-203(j)) and directly harm Wyoming subscribers whose local basic service rates must, by statute, be rebalanced to cover the shortfall in access revenues. It would also drive up subscriber line charges, and would still fail to fulfill -- or even address -- the promise to rural, high-cost areas of the nation for reasonable rate comparability made by Congress in 47 U.S.C. § 254(b)(3) of the Telecommunications Act of 1996. Finally, the very low proposed price for access appears to give interexchange carriers a windfall that would be difficult, if not impossible, to pass on to end use customers.

The WyPSC has commented many times about Wyoming's high cost of service, the resulting high local service rates and the insufficiency of the federal universal service fund. (Please see Exhibit A for a brief chronology of our efforts in this regard.) Wyoming is very rural with small, widely dispersed population centers typified by durably high costs for basic universal service. On September 29, 2008, we certified that, due to the high cost of providing universal service non-rural residential rates in Wyoming are not comparable to rates in urban areas.¹ We said the same thing in certifying rate comparability in 2007 and prior years. Many rural residential customers served by the Wyoming non-rural incumbent local exchange carrier (Qwest Corporation hereinafter "Qwest") pay a monthly rate of \$49.50, or 132% of the nationwide urban rate benchmark. The residential rate for Embarq in the Lingle, Wyoming, exchange is \$71.34, 191% above the nationwide urban average. These facts reflect the truly high cost, rural nature of much of Wyoming.

Wyoming has eradicated implicit subsidies from telecommunications rates in Wyoming and has ensured that the retail rate for each service covers its own total service long run incremental cost. Wyoming has implemented an explicit subsidy program in the form of the Wyoming Universal Service Fund. This has been done as required by Wyoming law (the Wyoming Telecommunications Act of 1995 and its comprehensive 2007 revision). The basic service rates paid by our retail consumers are not artificially high. Each ILEC operating in Wyoming has had to prove its costs before the WyPSC. Thus, when we say that a drastic, universal and very lightly examined reduction in access charges could harm Wyoming telecommunications service providers and their customers, our opinions are firmly grounded in fact.

The size of the federal universal service fund has been an issue for the Commission for some time now. In its First Remand Order, the Commission determined that the non-rural high-cost fund must be "only as large as necessary."² The Tenth Circuit, however, held that the Commission had failed to appropriately consider the range of universal service principles in 47 U.S.C. § 254(b).³ When the Tenth Circuit criticized gratuitous subsidies, it was a criticism of excessive support, *not* an argument against sufficient support.⁴ The Tenth Circuit did not encourage the Commission to find that the sufficiency requirement conflicted with the affordability principle. It did not suggest that the requirement to provide sufficient support is "balanced" by notions of affordability. Section 254(d) and (e) obligate the Commission to provide sufficient support, and no concept of "excessive subsidization" can undermine that duty.

¹ RE: Residential Rate Comparability Certification for Wyoming's Non-Rural Incumbent Local Exchange Carrier Serving in Rural Areas within Wyoming Pursuant to 47 C.F.R. § 54.316 (CC Docket No. 96-45).

² See First Remand Order, CC Docket No. 96-45 (Oct. 27, 2003) at ¶ 30.

³ See *Qwest Communications International, Inc. v. FCC* 398 F.3d 1222, 1234 (10th Circuit, 2005) (Qwest II).


⁴ See Qwest II at 1234 citing Qwest I at 1200 ("as we explained in our previous decision, excessive subsidization arguably may affect the affordability of telecommunications services, thus violating the principle in § 254(b)(1). The FCC is compelled to balance the § 254(b) principles to the extent they conflict").

The WyPSC pursued a remedy for this residential rate disparity through its request for further federal action, provided to state commissions in Part IV.D.2.e. of the First *Remand Order*. On December 21, 2004, the WyPSC, along with the Wyoming Office of Consumer Advocate, filed with the Commission a *Joint Petition for Supplemental Federal Universal Service Funds for Customers of Wyoming's Non-Rural Incumbent Local Exchange Carrier (Joint Petition)*. In response to the *Joint Petition*, the FCC opened a proceeding and established a pleading cycle on February 14, 2005, in CC Docket 96-45, to address the issues raised by the WyPSC. That proceeding is still pending before the Commission.

Again, we urge the Commission not to implement the intercarrier compensation and universal service reform proposals without first addressing the issues of sufficiency of support for local rates and their affordability. The WyPSC looks forward to working with the Commission and all other interested parties in addressing the 10th Circuit's decision, the universal service goals and principles of Section 254 of the federal Telecommunications Act of 1996 and in achieving residential rate comparability in Wyoming.

Sincerely,


KATHLEEN A. LEWIS, Chairman


STEVE OXLEY, Deputy Chairman

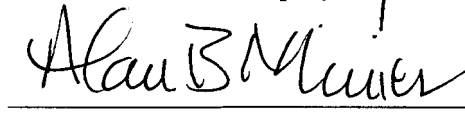

ALAN B. MINIER, Commissioner

Exhibit A
Chronology

- 1996 Congress passes the Telecommunications Act of 1996, adopting as a universal service principle, that consumers in rural areas should have access to telecommunications services at rates that are reasonably comparable to rates charged for similar services in urban areas. 47 U.S.C. §254(b)(3).
- 11/99 FCC issues *Ninth Report and Order* in Docket No. CC 96-45 implementing non-rural carrier universal service funding mechanism.
- 2001 Qwest Corp. v. FCC: U.S. Court of Appeals for the 10th Circuit reverses and remands the FCC's Ninth Report and Order. The 10th Circuit found that the FCC, among other things, had failed to define key statutory terms, failed to justify the 135 percent cost benchmark, and failed to evaluate data in the record comparing rural and urban costs under the proposed funding mechanism. The Court directed the FCC to define relevant statutory terms; assess whether funding mechanism will be sufficient to make rates reasonably comparable; provide adequate record support and reasoning for support level determined; and develop mechanisms to induce state action to assist in implementing universal service goals.
- 10/03 FCC issues *Remand Order*. Chairman Martin criticizes the order in a separate statement: "I believe that today's effort . . . falls short in meeting our obligation to ensure that consumers living in rural and high cost areas have access to similar telecommunications services at rates that are reasonably comparable to rates paid by urban consumers Today's recommendation falls short in its response to the court mandate that we define the statutory term "reasonably comparable" for purposes of the cost-based support mechanism and fails to demonstrate, with any degree of specificity, how the proposed secondary mechanism will satisfy the statutory requirement that universal service support be "specific, predictable, and sufficient."
- 2/05 *Qwest Communications Intl. v. FCC*: 10th Circuit reverses *Remand Order* in part. (Court found FCC, among other things, had not properly defined statutory terms, its comparability benchmark still allowed significant variance between urban and rural rates to continue unabated; and support was not shown to be sufficient to make rates reasonably comparable. Court states expectation that the FCC will act in "an expeditious manner."
- 9/05 "The WPSC pursued a remedy to this residential rate disparity through its request for further federal action, provided to state commissions in Part IV.D.2.e. of the *Remand Order*. On December 21, 2004, the WPSC, along with the Wyoming Office of Consumer Advocate, filed a *Joint Petition for Supplemental Federal Universal Service Funds for Customers of Wyoming's Non-Rural Incumbent Local Exchange Carrier (Joint Petition)*, with the FCC. In the *Joint Petition*, the WPSC provided a summary of the background,

circumstances and history of the WPSC's request for additional federal universal service funds. The *Joint Petition* clearly demonstrates Wyoming has taken all necessary steps to achieve reasonable comparability through our actions and the application of existing federal support. In response to the *Joint Petition*, the FCC opened a proceeding and established a pleading cycle on February 14, 2005, in CC Docket 96-45, to address the issues raised by the WPSC. That proceeding is currently pending before the FCC.”

(Residential Rate Comparability Certification for Wyoming’s Non-Rural Incumbent Local Exchange Carrier Serving in Rural Areas within Wyoming Pursuant to 47 C.F.R. § 54.316 (CC Docket No. 96-45)) At pages 2, 3.

- 12/05 FCC seeks comment on Remand Issues.
- 3/06 – “The courts and the Act support the WPSC position and we hope that the Commission will also support fair treatment for the described rural exchange customers.” **(In the matter of Federal State Joint Board on Universal Service High Cost Universal Service Support, WC Docket No. 05-337, CC Docket No. CC 96-45, Comments of the Wyoming PSC.) At page 7.**
- 3/06 Comment Cycle closes.
- 2/07 Chairman Martin states in response to questions posed by Senator Snowe in a Senate Commerce Committee hearing that he intends to circulate an order resolving this issue before the end of the year.
- 3/07 The Maine, Wyoming, Vermont, Kentucky, Montana, Nebraska, and South Dakota state commissions, and related state agencies, send letters to Chairman Martin asking that the FCC establish an early timetable for resolution of remand issues.
- 12/07 “. . . That proceeding is currently pending before the FCC.” **(Residential Rate Comparability Certification for Wyoming’s Non-Rural Incumbent Local Exchange Carrier Serving in Rural Areas within Wyoming Pursuant to 47 C.F.R. § 54.316 (CC Docket No. 96-45)) At page 3.**
- 4/08 “This Commission also must determine what “reasonably comparable” means pursuant to the remand of its decision to *Qwest II*. The Commission has yet to issue an order responding to the Tenth Circuit Court of Appeals’ decision in *Qwest II*. It has now been over three years since the Court directed the Commission to revise key elements of its non-rural carrier high cost commenter support rules so that sufficient support would be provided to non-rural carriers. Consumers in rural states have been waiting too long for the Commission to correct its misinterpretation of the statute and provide sufficient support to those states. A legal finding as to what constitutes “reasonably comparable” rates and service and what constitutes “sufficient” support must be made before the Commission proceeds to make the functional and legal findings” **(Joint Board Recommendation in the Matter of High Cost Support, WC Docket No. 05-337, CC Docket No. CC 96-45, Comments of Maine PUC, ConnectME Authority, Wyoming PSC, and Vermont DPS) At page 15.**

- 6/08 “The Vermont, Wyoming, and Maine state commissions, and commissions and related agencies from Nebraska, South Dakota, Kentucky, and West Virginia, have pressed the Commission to resolve the 10th Circuit remand issues for many months, and several carriers have requested waivers of universal service rules to provide company-specific fixes . . . It is imperative that the Commission adopt proper definitions and standards now to guide long term reform.” **(Joint Board Recommendation in the Matter of High Cost Support, WC Docket No. 05-337, CC Docket No. CC 96-45, Reply Comments of Vermont PSB, Vermont DPS, Maine PUC, ConnectME Authority, Wyoming PSC) At page 5.**
- 9/08 “. . . That proceeding is currently pending before the FCC.” **(Residential Rate Comparability Certification for Wyoming’s Non-Rural Incumbent Local Exchange Carrier Serving in Rural Areas within Wyoming Pursuant to 47 C.F.R. § 54.316 (CC Docket No. 96-45)) At page 3.**